United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

76-7203

United States Court of Appeals

For the Second Circuit

Docket No. 76-7203

NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO, and DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO,

Appellants,

—against—

HUGH CAREY, GOVERNOR OF THE STATE OF NEW YORK, and ROBERT P. WHALEN, COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK,

Appellees.

Appeal from the United States District Court for the Southern District of New York

APPENDIX

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Bar Ass'n Steno Serv. (Appeals Section) 212-687-0384

PAGINATION AS IN ORIGINAL COPY

I N D E X

DOCKET ENTRIES

Date	No.	Proceedings
02-09-76	1	Filed complaint and issued summons.
02-10-76	2	Filed plaintiffs' affidavit and ORDER to SHOW CAUSE why an order should not be entered pending a final hearing and determination of this action preliminarily enjoining the defendants from effectuating, administering and enforcing the provisions of Title 19 Sec. 86.21(k) and 86.17 etc. as indicated, ret. on Feb. 17, 1976 at 4:30 rm. 619.--- METZNER, J.
02-10-76	3	Filed plaintiffs' memorandum of law in support of the above.
03-01-76	4	Filed plaintiffs' affidavit of Richard Dorn in support of application for preliminary injunction.
03-01-76	5	Filed plaintiffs' reply memorandum of law.
03-06-76	6	Filed summons with marshal's return. Served on: Hugh Carey by Paul Gioia on 2/27/76 Robert Whalen by Ambrose Donovan on 3/9/76
03-23-76	7	Filed defendants memorandum of law.
03-23-76	8	Filed OPINION #44110. The motion for preliminary injunction is denied and the complaint is dismissed. So ordered. Metzner, J. m/n
03-26-76	9	Filed JUDGMENT AND ORDER in favor of defendants, dismissing the complaint. -- Clerk. m/n

Date	No.	Proceedings
04-22-76	10	Filed plaintiffs notice of appeal to the USCA for the 2nd Circuit from judgment dismissing the complaint - copy mailed to Atty. Gen'l State of New York.
04-22-76	11	Filed plaintiffs Undertaking for costs on appeal $250.00 - Fidelity & Deposit Co. of Maryland.
04-29-76	12	Filed notice that the record on appeal has been certified and transmitted to the USCA for the 2nd Circuit.

COMPLAINT

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO, and DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO,	:	Civil Action No.
Plaintiffs,	:	COMPLAINT
v.		
HUGH CAREY, GOVERNOR OF THE STATE OF NEW YORK; and ROBERT P. WHALEN, COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK,	:	
Defendants.	:	

Plaintiffs, by their attorneys, Sipser, Weinstock, Harper, Dorn & Leibowitz, complaining of defendants allege:

1. This action seeks a declaratory judgment pursuant to 28 U.S.C. §2201 that the provisions of Sections 86.21(k) and 86.17 of the Administrative Rules and Regulations of the Commissioner of Health, 10 N.Y.C.R.R. 86.21(k) and 86.17 are null, void and ineffective under the Supremacy Clause in Article VI of the United States Constitution insofar as said regulations are in conflict with the United States Social Security Law and the regulations thereunder, particularly Section 1396a(a)(13)(D) of Title 42 of the United States Code, and insofar as they further

conflict with the United States Labor Management Relations Act of 1947, as amended, 29 U.S.C. §§151 et. seq. This action further seeks a permanent and preliminary injunction, enjoining the defendants from effectuating, administering and enforcing the provisions of Title 10, Sections 86.21(k) and 86.17 of the Administrative Rules and Regulations of the Commissioner of Health, 10 N.Y.C.R.R. 86.21(k), 86.17 and any other regulation which prohibits or restricts the payment of the actual reasonable costs of health care services as mandated in 42.U.S.C. §1396(a) and the regulations promulgated pursuant thereto.

2. This action arises under the Supremacy Clause in Article VI of the Constitution of the United States; under Title XIX of the Social Security Act, the Act of July 30, 1965, 79 Stat. 344, 42 U.S.C. §1396, et seq. and under the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §151 et seq.

3. Jurisdiction is conferred upon the court pursuant to 28 U.S.C. §1331(a) as the matter in controversy exceeds the sum or value of $10,000 exclusive of costs and interests and arises under the Constitution and Laws of the United States as set forth above; and is further conferred pursuant to 28 U.S.C. §1337 as the action arises under an Act of Congress regulating commerce, i.e., the Labor Management Relations Act of 1947, as amended (hereinafter "LMRA").

4. Plaintiff, National Union of Hospital and Health

Care Employees, RWDSU, AFL-CIO (hereinafter "National Union") is a labor organization as defined in Section 2 of the LMRA, 29 U.S.C. §152(3) with principal offices located in the City, County, and State of New York. The National Union represents for purposes of collective bargaining over 80,000 employees of health care institutions within the United States, including over 50,000 in New York State.

5. Plaintiff, District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO (hereinafter "District 1199") is a labor organization which is an indivisible part of the plaintiff National Union. District 1199 negotiates collective bargaining agreements for over 50,000 of its members employed in health care institutions which receive Medicaid funds from the State of New York.

6. Defendant, Hugh Carey is Governor of the State of New York, having been duly elected to such office and presently serving as such, in which capacity said defendant is the chief administrative officer charged with the duty and responsibility of executing and administering, or causing to be executed or administered, all of the laws and regulations of the State of New York.

7. The defendant, Robert P. Whalen is Commissioner of Health of the State of New York, having been duly appointed to that position and presently serving as such, in which capacity

said defendant is the chief officer of the Department of Health charged with the duty and responsibility of promulgating regulations for the administration of the State medical assistance plan for indigents, popularly known as "Medicaid" and to supervise and control the quality of medical and remedial care given by hospitals in the State of New York.

8. Medicaid is a state plan to furnish medical assistance to the indigent. New York receives federal grants for its Medicaid plan under Title XIX of the Social Security Act, Grants to States for Medical Assistance Programs, 42 U.S.C. §1396 et seq. In order to be approved for such grants, a state plan must meet the requirement of Title XIX and of the regulations promulgated pursuant thereto.

9. Prior to the effectuation of the regulations under challenge herein, health care institutions were reimbursed for the actual costs of inpatient services, including the costs of employee wage and benefit increases negotiated in collective bargaining, provided to persons eligible under the plan. The reimbursement rate for each institution was computed annually by the defendant Commissioner based on the actual costs incurred by an institution providing services and could be adjusted during the pay year to allow for negotiated employee wage and benefit increases so as to reflect actual current costs.

10. Upon information and belief, on or about

November 1, 1975 the defendant Commissioner of Health, without approval of the Secretary of Health, Education and Welfare of the United States, effectuated Sections 86.21(k) and 86.17, 10 N.Y.C.R.R. 86.21(k), 86.17. Section 86.21(k) freezes the rate of reimbursement for the costs of inpatient services that a health care institution is entitled to receive under Medicaid to the rate of reimbursement received in the fiscal year 1975 subject to certain criteria enumerated in Section 86.17 which allows for adjustment of said rates based on considerations not relevant herein. Such freeze prohibits a health care institution from receiving payment or rate adjustments for the costs of employee wage and benefit increases negotiated in collective bargaining agreements after the effective date of the freeze regulation.

11. Regulation 10 N.Y.C.R.R. 86.21(k) provides:

> "Effective for fiscal years ending in 1976 and thereafter allowable costs per unit of service (inpatient day, clinic visit, etc.) in a base year will not include any cost increases over the prior year which are in excess of the inpatient factor used by the Department in determining the reimbursement rate in effect during such base year unless the cost increases in the base year resulted in a rate revision during the rate year in accordance with Section 86.17."

12. Regulation 10 N.Y.C.R.R. 86.17 provides:

> "Revisions in Certified Rates
>
> (a) The State Commissioner of Health may consider only those applications for prospective revisions of certified rates which are based on
>
> (1) requests for revisions in 1975 reimbursement rates for cost increases incurred prior to the effective date of this section;

(2) errors made in the rate computation process or in the submission by a medical facility which have been brought to the attention of the Commissioner within the time limits prescribed in Section 86.16;

(3) significant increases in the over-all operating costs of a medical facility resulting from the implementation of additional programs, staff or services specifically mandated for the facility by the Commissioner;

(4) significant increases in the over-all operating costs of a medical facility resulting from capital renovation, expansion, replacement or the inclusion of new programs, staff or services, approved for the medical facility by the Commissioner;

(5) requests for waivers of any provisions of Part 86 for which waivers may be granted by the Commissioner as prescribed in specific sections; and

(6) changes in the method of providing services which result in a lower over-all cost for the services provided."

13. The impact of this "freeze" arbitrarily and capriciously adopted by the Commissioner of Health of the State of New York has already injured the membership of the National Union recently in connection with the strike and settlement between the National Union and Lakeshore Nursing Home, located in Rochester, New York. Subsequent to a lawful strike, engaged in by the National Union against Lakeshore Nursing Home, the parties, on or about December 29, 1975, entered into a collective bargaining agreement providing for reasonable increases in wages and benefits. In view of the impending "freeze" regulations,

it was provided in Appendix C, subdivision (4) of the said agreement as follows:

> "It is understood and agreed that if the appropriate New York State authorities reject the rate adjustment as requested by the Employer, then, and in that event, this Agreement in its entirety shall be deemed null and void and the Union may continue the present strike and picketing against the Home."

14. Efforts by the National Union and the Lakeshore Nursing Home sincerely and diligently made, to seek reimbursement for these wage increases, were rejected by the defendant Commissioner of the Department of Health of the State of New York by virtue of said regulations 86.21(k) and 86.17 freezing Medicaid reimbursement rates and prohibiting adjustments of said rates. The agreement entered into became null and void and the strike and picketing, which had been settled by the agreement, were continued.

15. District 1199 is a party to a collective bargaining agreement now in effect with the League of Voluntary Hospitals and Homes of New York, Inc. (hereinafter the "League"), an employer association of hospitals and nursing homes employing over 40,000 members of District 1199. Negotiations for a new agreement to replace the current agreement which expires on June 30, 1976 will commence in or about May of 1976. There are over fifty (50) voluntary Hospitals and Homes involved in these negotiations as members of the League and approximately forty

thousand (40,000) employees performing various services are effected. All of these Hospitals and Homes receive Medicaid payments and are directly affected by the Medicaid "freeze" regulations instituted by the defendant Commissioner of the Department of Health, which regulations are being strictly enforced. Representatives of the League have informed officers of District 1199 that the "freeze" regulations will make it impossible to agree to any increases in wages or other monetary items of collective bargaining and meaningful collective bargaining will thereby be rendered impossible, leaving no choice other than a lawful resort to, but undesired use of, the right to strike.

AS AND FOR A FIRST AND DISTINCT CAUSE OF ACTION:

16. 42 U.S.C. §1396 (a) (13) (D) provides as follows:

"(a) A state plan for medical assistance must -

* * * * *

(13) provide -

* * * * *

(D) for payment of the reasonable cost of inpatient hospital services provided under the plan, as determined in accordance with methods and standards, consistent with section 1320a-1 of this title, which shall be developed by the State and reviewed and approved by the Secretary and (after notice of approval of the Secretary) included in the plan...."

17. Pursuant to the authority of 42 U.S.C. §1302 and 42 U.S.C. § 1396(a)(13)(D) the Secretary of the Department of Health, Education and Welfare promulgated regulations and standards

for the implementation of reasonable costs including 20 C.F.R. §405.402 which provides in relevant part that:

> "(a) In formulating methods for making fair and equitable reimbursements for services rendered beneficiaries of the program, payment is to be made on the basis of current costs of the individual provider, rather than costs of a past period or a fixed negotiated rate. All necessary and proper expenses of an institution in the production of services, including normal standby costs, are recognized. Furthermore, the share of the total institutional cost that is borne by the program is related to the care furnished beneficiaries so that no part of their cost would need to be borne by other patients. Conversely, costs attributable to other patients of the institution are not to be borne by the program. Thus, the application of this approach, with appropriate accounting support, will result in meeting actual costs of services to beneficiaries as such costs vary from institution to institution. However, payments to providers of services for services rendered health insurance program beneficiaries are subject to the provisions of Sections 405.455 and 405.460."

18. The provisions of said freeze regulations 10 N.Y.C.R.R. 86.21(k) and 86.17 conflict with the provisions of 42.U.S.C., Section 1396(a)(13)(D) in that:

a) Due to the continuing rise of the costs of health care services those institutions which were receiving reasonable actual current costs in 1975 as established heretofore, will not, subsequent to 1975 be receiving reasonable actual current costs, since said regulations do not allow for any increase in payments to meet the actual rising costs the health care institutions

will necessarily incur, particularly those costs for reasonable increases in wages and benefits negotiated in collective bargaining agreements; and

b) the provisions of said freeze regulation are similarly not in accordance with the standards promulgated by the Secretary of Health, Education and Welfare as authorized by 42. U.S.C. Section 1396a(a)(13)(D) as set forth above.

19. The provisions of said freeze regulation therefore violate the Supremacy clause of Article VI of the United States Constitution and 42 U.S.C. Section 1396a(a)(13)(D) and are null, void and ineffectual.

AS AND FOR A SECOND AND DISTINCT CAUSE OF ACTION:

20. 42 U.S.C. Section 1396a(b) and the regulations authcrized thereunder and promulgated pursuant thereto by the Secretary of Health, Education and Welfare, 45 C.F.R. Section 2013(a) provide in substance that the Secretary of Health, Education and Welfare must approve any new or revised state medical assistance plan (Medicaid).

21. The unilateral implementation of said freeze regulations, 10 N.Y.C.R.R. 86.21(k) and 86.17 by defendant Commissioner of Health violates the provisions of 42 U.S.C. Section 1396a(b) and of 45.C.F.R. Section 201.3(a) in that said

Medicaid freeze constitutes a revision of the Medicaid plan unapproved by the Secretary of Health, Education and Welfare.

AS AND FOR A THIRD AND DISTINCT CAUSE OF ACTION:

22. On or about August 24, 1974 the Labor Management Relations Act of 1947, as amended, was further amended to provide for inclusion of health care employees under the aegis of the Act, and thereby pre-empts state governments from regulating or encumbering labor relations including collective bargaining in the health care industry, or from enacting any legislation or promulgating any regulations which constructively repeal such federal legislation. Section 8(d) of the LMRA, as amended, 29 U.S.C.A. 158(d) provides for special notice provisions for the modification or termination of collective bargaining agreements in health care institutions. Section 8(g), 29 U.S.C.A Section 158(g) provides for special notice requirement to employers before work stoppages may occur in a health care institution. Section 213 of the LMRA, as amended, 29 U.S.C. §183 provides for the mediation and conciliation of labor disputes in the health care industry including the appointment of federal fact finders. Section 7, 29 U.S.C. Section 157 provides for the rights of employees to "bargain collectively through the representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining...." Section 8(a)(5), 29 U.S.C. Section 158(a)(5) provides that it

shall be an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees. . . ."

23. Medicaid freeze regulations, 10 N.Y.C.R.R. 86.21(k) and 86.17 conflict with said provisions of the LMRA, as amended, as they interfere with, encumber and constitute an unreasonable restraint on bona fide collective bargaining in the health care industry and in that they constrain, restrict and unreasonably limit the ability of a collective bargaining representative to negotiate reasonable wage and benefit increases and other monetary items for its members, and thereby discourage peaceful resolution of labor disputes.

24. Regulations 10 N.Y.C.R.R. 86.21(k) and 86.17 are therefore null and void insofar as they constitute an unreasonable restriction upon supreme federal labor policy as expressed in the LMRA, as amended, pursuant to the provisions of the Supremacy Clause of Article VI of the Constitution of the United States.

25. Plaintiffs have no adequate remedy at law and will suffer irreparable injury to themselves and their members unless the court preliminarily and permanently enjoins the defendants from effectuating, administering and enforcing the provisions of 10 N.Y.C.R.R. 86.21(k) and 86.17.

WHEREFORE, plaintiffs request that an order and judgment be entered:

1) declaring that the provisions of Sections 86.21(k) and 86.17 of the Administrative Rules and Regulations of the Commissioner of Health, 10 N.Y.C.R.R. 86.21(k) and 86.17 insofar as they forbid full payment to health care institutions of the actual reasonable current cost of inpatient services, including the costs of reasonable employee wage and benefit increases negotiated in collective bargaining agreements, rendered to participants in the New York medical assistance plan, are in conflict with the United States Social Security Law and the regulations thereunder, particularly Section 1396a(a)(13)(D) of Title 42 of the United States Code, and therefore violate the Supremacy Clause of Article VI of the United States Constitution and are void and ineffective; and

2) directing that as long as New York State participates in a plan for medical assistance to the medically indigent under the provisions of Title XIX of the Social Security Act it must provide for payments to health care institutions of the full actual and current costs of inpatient services, including the costs of increases in employee wages and benefits negotiated in collective bargaining agreements, furnished to eligible, individuals; and

3) declaring that the provisions of Sections 86.21(k) and 86.17 of the Administrative Rules and Regulations of the Commissioner of Health, 10 N.Y.C.R.R. 86.21(k) and 86.17

insofar as they encumber, restrain and interfere with, and constructively nullify bona fide collective bargaining in the Health Care industry, are in conflict with the United States Labor Management Relations Act of 1947, as amended, and therefore violate the Supremacy Clause of Article VI of the United States Constitution and are void and ineffective; and

4) permanently, and preliminarily pending a final hearing and determination of this action, enjoining the defendants from effectuating, administering and enforcing the provisions of Title 10, Sections 86.21(k) and 86.17 of the Administrative Rules and Regulations of the Commissioner of Health, 10 N.Y.C.R.R. 86.21(k) and 86.17 and any other regulation which prohibits or restricts the payment of the actual reasonable current costs of health care services as mandated in 42 U.S.C. Section 1396(a) and the regulations promulgated pursuant thereto; and

5) directing such other and further relief as to the Court may seem just and proper, together with the reasonable costs and fees of this action.

Dated: New York, New York
February 6, 1976

SIPSER, WEINSTOCK, HARPER, DORN & LEIBOWITZ

By: _____
Harry Weinstock
A Member of the Firm
Attorneys for Plaintiffs
Office and Post Office Address
380 Madison Avenue
New York, New York 10017

Complaint

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LEON J. DAVIS, being duly sworn, deposes and says that he is President of the National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO and District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, the plaintiffs herein; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge, except the matters therein stated to be alleged on information and belief, and that as to those matters, he believes it to be true.

Deponent further says the reason this verification is made by him is that the petitioners, the Unions herein, are unincorporated associations and that he is an officer of each of them, to-wit, the President.

Leon J. Davis

Sworn to before me this
6th day of February, 1976

Florence H. Johnson

FLORENCE H. JOHNSON
Notary Public, State of New York
No. 31-1978390
Qualified in New York County
Commission Expires March 30, 1977

ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO, and DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO, Plaintiffs, v. HUGH CAREY, GOVERNOR OF THE STATE OF NEW YORK, and ROBERT P. WHALEN, COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK, Defendants.	Civil Action No. 76-645 C.M.M. ORDER TO SHOW CAUSE ~~WITH TEMPORARY RESTRAINING ORDER~~ FOR PRELIMINARY INJUNCTION

Upon the summons and complaint herein and the annexed affidavit of Leon J. Davis, sworn to the 5th day of February, 1976 and the exhibits annexed thereto, and upon the affidavit of Judy Berek, sworn to the 4th day of February, 1976, it is

ORDERED, that defendants show cause before this Court on February 17, 1976, at 4:30 o'clock in the afternoon, or as soon thereafter as counsel may be heard in Room 619 of the United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, why an Order, pursuant to Rule 65 of the Federal Rules of Civil Procedure, should not be entered pending a final hearing and determination of this action, preliminarily enjoining the defendants from effectuating, administer-

ing and enforcing the provisions of Title 10, Section 86.21(k) and 86.17 of the Administrative Rules and Regulations of the Commissioner of Health, 10 N.Y.C.R.R. 86.21(k), 86.17 and any other regulations which prohibit or restrict the payment of the current actual reasonable cost of health care services as mandated in 42 U.S.C. §1396a and the regulations promulgated pursuant thereto, together with such other and further relief as to this Court may seem just and proper; and it is further

ORDERED, that personal service of a copy of this Order to Show Cause, together with the papers upon which it is made, on the defendants or the Attorney General of the State of New York, on the 10th day of February, 1976, by Noon shall be deemed good and sufficient service.

Charles M Metzner
U. S. D. J.

DATED
~~ISSUED~~ AT
New York, New York
February 9th, 1976

AFFIDAVIT OF LEON J. DAVIS IN SUPPORT OF REQUEST FOR ORDER TO SHOW CAUSE

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO and DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO,	:	Civil Action
Plaintiffs,	:	No.
v.	:	AFFIDAVIT
HUGH CAREY, GOVERNOR OF THE STATE OF NEW YORK; and ROBERT P. WHALEN, COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK,	:	
Defendants.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LEON J. DAVIS, being duly sworn, deposes and says:

1. I am President of both the plantiff, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO ("National Union") and DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO ("District 1199").

2. District 1199 is an indivisible part of the National Union, which, in turn, is affiliated with the Retail, Wholesale, and Department Stores Union, AFL-CIO.

3. The National Union and District 1199 are labor organizations that are engaged in organizing and representing employees in the health care industry including, without limitation, Hospitals, Homes and other health care facilities. The National Union operates under a Constitution on a national scale in the field described above and District 1199 conducts its organizing representation and collective bargaining in the geographic area encompassed within the City of New York and its environs, as well as in the States of New Jersey and Connecticut.

4. The plaintiff, District 1199, represents under collective bargaining agreements over fifty-thousand (50,000) employees who work in substantially all of the major voluntary Hospitals and Homes in the City of New York, as well as employees in Hospitals and Homes in Connecticut and New Jersey. The National Union covers approximately a total of eighty thousand (80,000) employees inclusive of employees in states other than the states above mentioned. The employees so represented by both the National Union and District 1199 cover practically the whole range of employees in Hospitals and Homes; i.e. service

and maintenance employees, technical employees, clerical employees and a substantial number of professional employees.

5. In the City of New York, District 1199 has a collective bargaining agreement with an Association of Employers; i.e. the League of Voluntary Hospitals and Homes of New York, Inc. ("League"), which bargains collectively on behalf of its members with District 1199. The membership of District 1199 employed by members of the League and covered by the current collective bargaining agreement with the League numbers approximately forty thousand (40,000). The current collective bargaining agreement with the League will, by its terms, expire June 30, 1976.

6. Prior to August 24, 1974, jurisdiction of health care employees in the State of New York resided in the New York State Labor Relations Board. The Labor Law of the State of New York in Section 713 thereof prohibited strikes in Hospitals and Homes and other residential care centers and, pursuant to Section 716 of the said labor law, provided for compulsary and binding arbitration in the event of an impasse in negotiations. The plaintiff, District 1199, sponsored and advocated this legislation, although it was unpopular with a significant segment of the labor movement, in order to avert strikes in Hospitals and Homes and to resolve

disputes by means of such binding arbitration. Pursuant to such law the then Commissioner of Labor of the State of New York appointed panels of arbitrators in 1972 and in 1974 which rendered awards resolving disputes between District 1199 and the League, in each case covering a period of two (2) years. The current collective bargaining agreement between District 1199 and the League is the result of such a panel of arbitrators' awards and expires June 30, 1976.

7. Effective August 24, 1974, the Labor Management Relations Act, as amended, was further amended to include in its ambit coverage of all employees in the health care industry (LMRA, Public Law of 93.360, 93rd Cong. S. 3203, 88 Stat. 395). Thus employees in the health care industry were accorded the same rights as all other employees whose employers are engaged in commerce, in the private sector. The State was, as a result of such Federal legislation, ousted of jurisdiction over health care employees in the field of labor relations. Health care employees, by this Congressional mandate, acquired the right to strike, picket and engage in other concerted activity subject to certain safeguards contained in the amended Act. These safeguards were designed by Congress to facilitate the resolution of disputes between Unions and Management in this industry. Simply stated, they

consisted of the following:

1) Certain prerequisite notices served on the Federal Mediation and Conciliation Service to invoke their intervention and aid in the negotiation process. [Sec. 8(d), LMRA, as amended, 29 U.S.C.A. 158(d)]

2) Failing agreement, the appointment by the Federal Mediation and Conciliation Service of a Fact Finding Panel to hold hearings and to render a Report and Recommendation on disputes to the parties. [Sec. 213, LMRA, as amended, 29 U.S.C.A. Sec. 183]

3) Failing agreement to accept said Report and Recommendations, the Union, upon serving upon the Employer a required statutory notice containing the time, date and bargaining unit involved is privileged to strike, picket and engage in other lawful concerted activity. The purpose of the statutory notice is to afford the Hospital or Home an opportunity to decide what steps to take to provide continued medical care for its patients. [Sec. 8(g), 29 U.S.C.A.158(g)

In enacting the Amendment to the LMRA to bring health care employees under its jurisdiction, Congress was well aware of the very sensitive nature of the industry and made these provisions for peaceful negotiations. It ill becomes the State to countermand this Congressionally expressed purpose by effectively destroying the basic and vital right of collective bargaining.

8. Since the National Labor Relations Board has assumed jurisdiction in the health care industry, the National Union and

particularly District 1199 has had to resort to Fact Finding Boards designated by the Federal Mediation and Conciliation Service and invariably District 1199 has accepted their Recommendations. Only on occasions when an Employer has rejected the Recommendations and no compromise agreement could be reached have strikes and picketing occurred as a last resort.

9. The announced policy of the plaintiffs has been and still is that rather than resort to economic strife, it would accept voluntary binding arbitration to resolve all disputes. Such voluntary arbitration is not as a rule acceptable to managment.

10. Your deponent is aware that the atmosphere in the health care industry has been fouled by the revelations of corrupt practices and mismanagement. This scandalous situation, naturally, tends to pollute the air surrounding the whole industry. This is understandable, but at the same time this unfortunate circumstance should not be allowed to spill over on the workers in this industry. It is important to underscore a caveat in this context that the justifiable animus against a handful of self-seekers who disgrace the health care industry should not be directed against the workers in this industry who diligently and devotedly care for the sick, the infirm and the

disabled. These workers are entitled to make a living in order to support themselves and their families. They are entitled to the appreciation of the public for the useful and critically important services they perform in the medical field.

11. Upon information and belief on November 1, 1975, the Commissioner of Health promulgated regulations freezing Medicaid reimbursement rates on the already fixed and established basis of the 1975 reimbursement rates. This "freeze" prohibits such reimbursement rates from being increased to meet the reasonable cost of in-patient hospital services that may be incurred in order to efficiently provide required services to Medicaid patients [86.21(K) of the Rules and Regulations of the State of New York 10 N.C.C.R.R.].

12. This prohibition which freezes the Medicaid rate is not ameliorated by regulation 86.17 of the Rules and Regulations of the State of New York which makes allowances for certain revisions in the pay year but excludes any adjustments for increases in wages or fringe benefits regardless as to whether they represent reasonable costs of Hospitals and Homes in order to run the facilities on an efficient basis. Wages and fringe benefits are not among the <u>limited</u> exceptions set forth in 86.17. Consequently, it is clear that the State regulations are in

direct conflict with the provisions of the Federal Social Security Act and the regulations promulgated pursuant thereto. They are also by this same token violative of the Labor Management Relations Act.

13. This freeze, put into effect by the Commissioner of the Department of Health, flies in the face of the Social Security Act which mandates that the State in its Plan must provide for the payment of reasonable costs of in-patient care [Title 42 USC 1396a(a)(13) D]. In other words, the regulationsadopted by the Department of Health of the State of New York to effectuate this freeze areinconsistent with the requirements of the Federal Social Security Act and are therefore void and unconstitutional as in conflict with the Supremacy Clause of the United States Constitution, as I am informed by our attorneys.

14. Furthermore, upon information and belief, the Commissioner of Health failed to submit the said innovations and modifications of the Medicaid Plan to the Secretary of H.E.W. as required by 42 USC 1396a(b) and the regulations authorized thereunder and promulgated pursuant thereto by the Secretary of H.E.W.

15. Boiled down to its essence the impact of this arbitrary and capricious freeze of Medicaid reimbursement constitutes an effective freeze or moratorium of wage increases and benefits to employees and thus unlawfully and invidiously discriminates

against employees in the health care industry in New York State. To cope with this restriction in reimbursement imposed by the Department of Health, the Hospitals and Homes would be induced to cut corners by either lay-offs of employees, diminution of services and other economies in food, drugs, and the like.

16. This application of the new Rules and Regulations would not only destroy bona fide collective bargaining, hereinafter more fully dealth with, but must result in a deterioration of medical services and a diminution of efficiency in in-patient care; all in clear violation of the Social Security Act.

17. The Federal statute and regulations do not allow the State to single out the essential services performed by workers for a freeze or moratorium on wages and other fringe benefits. On the contrary, Federal law mandates payment of all reasonable costs including those attributable to wages and fringe benefits.

18. Such a freeze on wage increases and/or benefits to employees, in contravention of the Federal law, contravenes the national labor policy expressed unequivocally in the Labor Management Relations Act, as amended. It makes a nullity, if not a mockery of:

1) Bona fide collective bargaining for health care employees, contrary to law.

2) It renders the services of the Federal Mediation and Conciliation Services futile, contrary to law.

3) It turns the Fact Finding Boards into an excercise in futility, contrary to law.

19. What it accomplishes, contrary to the aim, purpose, and policy of the Labor Management Relations Act, as it applies to the health care industry, is to leave no alternative but the instrumentality of strike, picketing and other lawful concerted activity guaranteed and protected by the Federal Act for employees in the health care industry.

20. Such a result unilaterally effectuated by the unlawful regulations of the Department of Health of the State of New York is to be deplored and should be enjoined to prevent the irreparable damage that it is bound to cause to patients, workers and the public who will be the innocent victims of such arbitrary and unlawful action.

21. The impact of this freeze has already had an injurious effect upon the National Union and its members. Recently, the National Union organized and was certified as the collective bargaining agent for the service and maintenance employees of Lakeshore Nursing Home, located in Rochester, New York. After an impasse in negotiations, the Federal Mediation and

Conciliation Service appointed a Fact Finding Board. This Board conducted hearings on the disputes between the parties. The Board issued its Findings and Recommendations. The Union was willing to accept the Board's recommendations for settlement. Because of the impending Medicaid freeze, the Employer rejected the recommendations. Thus, the Medicaid freeze regulations frustrated the efforts of Fact Finding and made its reasonable efforts at settlement an impossibility. As a result, the National Union was compelled to serve the statutory strike notice and thereafter to commence striking and picketing.

22. Thereafter, and during the strike, and on or about December 29, 1975 the National Union and Lakeshore Nursing Home, in a further effort to settle the strike, entered into a conditional collective bargaining agreement providing for wage increases of a much more modest nature than that found reasonable by the Fact Finding Report. Mindful of the freeze promulgated by the Commissioner of the Department of Health, the Employer insisted on including the following provision in Appendix C, Subdivision (4) of the said collective bargaining agreement:

> "It is understood and agreed that if the appropriate New York State authorities reject the rate adjustments as requested by the Employer, then, and in that event, this Agreement in its entirety shall be deemed null and void and the Union may continue the present strike and picketing against the Home."

23. Despite sincere and diligent efforts made to obtain approval of reimbursement for this moderate wage increase, the Department of Health, pursuant to its freeze on wages and other fringe benefits, rejected the application therefor delivered to it by hand, and issued a letter of refusal dated December 31, 1975 to that effect. A copy of that letter is attached hereto, marked Exhibit "A". (See also accompanying affidavit of Judy Berek). As a result, the agreement became null and void and the strike continued.

24. It is well to bear in mind that Medicaid costs represent a substantial part of the income of Hospitals and Homes. The extent of costs depends naturally on the location of the Hospital, Home or other medical facility. If located in a neighborhood populated by poor and indigent people, the extent sharply rises. If located in areas less inhabited by indigent persons, the extent declines. In any event, the range of impact runs between about 25% and 90%. It is evident that

the Medicaid freeze can thus have a widespread and deleterious effect on the delivery of Medicaid services in sharp conflict with the Social Security Act and t regulations thereunder.

25. A recent article appearing in the January 16, 1976 issue of the Journal of American Hospital Association has a very relevant and revelatory quote in it from Mr. William Abelow, executive director and counsel for the League of Voluntary Hospitals and Homes, Inc., which states:

> "'The state health department already has served notice on the voluntary system that it should no longer expect to be reimbursed or have reimbursement adjusted as a result of labor settlements. The question is in what position does this place Local 1199. It will make our task simpler in dealing with the unions. If we have no money, we can't offer any. What happens at this crisis point, however, remains to be seen. I don't know how easy it's going to be for the voluntaries and the unions to face up to that situation. Will the unions simply sit by and accept no money as a fact of life?'
>
> "Complicating the matter, Mr. Abelow says, is that, as of Jan. 1, 1976, League members under contract with Local 1199 are scheduled to pay an extra two percent to the union's pension welfare funds. 'With reimbursement the way it is, there are a number of institutions that simply are not going to be able to do that,' he states. On top of all this, he

> adds, the voluntary hospitals will be bargaining with the major unions under the new provisions of the National Labor Relations Act without the specter of compulsory arbitration."
>
> [New York City Hospitals: The Financial Crunch, 50 Jo. Amer. Hosp. Assoc. 59, Jan. 16, 1976]

26. A recent written communication sent to the Metropolitan New York Nursing Home Association by the defendant Commissioner through his deputy Commissioner demonstrates the flat refusal of the defendants to allow repayment to health care institutions for negotiated wage and benefit increases. In response to a telegram sent to the defendant Commissioner by the President of the Association the deputy commissioner in a letter dated December 11, 1975, stated:

> "Your Association must be aware that no 1976 Medicaid rate increases will be granted because of labor negotiations. This policy is set forth in amended section 86.17 of the Commissioner's Rules and Regulations. . ."

Said letter is annexed hereto as Exhibit "B".

27. Thus, it is crystal clear that these unlawful regulations of the Department of Health not only defy the Social Security Act but they suppress and in effect abolish bona fide negotiations, fact finding and all other provisions of the LMRA with a stroke of the pen.

28. Moreover, the effectuation of this freeze, mainly aimed at freezing wages at the 1975 reimbursement level, represents a very serious invasion of the fundamental right of bona fide collective bargaining in a field where such bargaining is long overdue and critically necessary. In this connection, it must be borne in mind that wages and salaries represent about sixty (60%) percent of Hospital and Home costs and such costs are an inextricable part of the actual reasonable costs of in-patient care in order to provide efficient medical service mandated by the Social Security Act. To freeze such wages or other necessary benefits at the 1975 level is unreasonable and a subversion of the obligation of the Department of Health to conform to the reimbursement for actual reasonable costs to provide efficient service.

29. As aforesaid, the collective bargaining agreement, now in effect between the League and District 1199, expires June 30, 1976. Negotiations for a new agreement to replace the expiring agreement will doubtless commence in or about May of 1976. There are over fifty (50) voluntary Hospitals and Homes involved in these negotiations as members of the League. As already stated, approximately forty thousand (40,000) employees performing various types of services are affected. All of these

Hospitals and Homes are directly affected by the Medicaid freeze regulation instituted by the Commissioner of the Department of Health in varying degrees. The regulations are being uniformly and adamantly enforced. The enforcement of this freeze will render these city-wide negotiations and collective bargaining virtually nugatory. This arbitrary and capricious prohibition of adjustment of Medicaid reimbursement rates to conform with reasonable costs of in-patient hospital services, violative of the Social Security Act, will open a Pandora's box of mischief and conflict that will represent a hazard to the public.

30. I have shown that the freeze runs counter to the whole scheme of labor relations affecting the health care industry, as designed by Congress in the Labor Management Relations Act. The Federal policy in labor relations will be regulated out of existence in the health care industry by the State of New York.

31. Only the strike weapon will remain to vindicate the normal and natural aspirations of employees in the health care industry, who will be relegated to using this strike weapon regardless of their preference to settle their differences peacefully without resort to strike.

32. The continuation of this unlawful freeze has, as above explained, already caused injury and loss to members of

the National Union employed in Lakeshore Manor Nursing Home. It will interfere with and, contrary to law, adversely affect both the National Union's and District 1199's ability to engage in organizing employees in the health care industry. It will, in addition, prevent bona fide meaningful collective bargaining with other employers in the industry whose contracts will expire prior to June 30, 1976, and, for that matter, after June 30, 1976. Most emphatically, this unlawful freeze which violates the Federal Social Security Act, will, if it is not enjoined and held to be void and unconstitutional, foreclose the possibility of peaceful, bona fide collective bargaining with the League by overriding the provisions of Federal law as it applies to employees in the health care industry.

33. It must be borne in mind that the freeze of rate reimbursement in the State of New York will also inevitably haunt the negotiations of the National Union in the health care industry in states other than New York State and thus cause a complete break-down in the effectuation of Federal scheme that the plaintiffs are entitled to have protected against such unlawful interference.

34. Your deponent calls to the attention of the Court that the attorneys for the plaintiffs are submitting a complaint

and brief herein which sets forth more fully the legal basis upon which your deponent claims that the freeze of Medicaid by the Commissioner of Health is in violation of the Social Security Act and its requirements and in contravention of the Supremacy Clause of the Constitution of the United States.

35. In view of all of the foregoing, your deponent earnestly and respectfully asks this Court to grant the relief requested by the plaintiffs in their complaint submitted to the Court in this proceeding.

Leon J. Davis

Sworn to before me this
5th day of January, 1976.

Florence H. Johnson
Notary Public

FLORENCE H. JOHNSON
NOTARY PUBLIC, State of New York
No. 31-[illegible]
Qualified in New York County
Commission Expires March 30, 1977

EXHIBIT A
[Annexed to Affidavit of Leon J. Davis]

STATE OF NEW YORK
DEPARTMENT OF HEALTH

TOWER BUILDING
EMPIRE STATE PLAZA
ALBANY, NEW YORK 12237

P. WHALEN, M.D.
OMMISSIONER

DIVISION OF
HEALTH ECONOMICS

WILLIAM F. MC CANN
ASSISTANT COMMISSIONER

DONALD B. DAVIDOFF
ASSOCIATE DIRECTOR

December 31, 1975

Mr. Vito P. Laglia
Lakeshore Nursing Home
425 Beach Avenue
Rochester, New York 14612

Dear Mr. Laglia:

I am in receipt of your letter of December 29, 1975 in which you request that the 1976 reimbursement rate for Lakeshore Nursing Home be increased to reflect the salary increases established through negotiation with the National Union of Hospital and Health Care Employees, RWOSU/AFL-CIO (1199) and for certain expenditures or losses incurred during the recent strike.

The portion of your appeal for a rate adjustment which has by far the greatest fiscal impact is the increased cost for salaries. We are able to reply to that portion immediately and will review the other elements in your appeal.

As I am sure you are aware, Medicaid prospective rates are established by applying an inflation projection factor to reported allowable historical costs. The factor used is developed from the price movement of materials and supplies used by nursing homes and from general salary increases that have been negotiated in the geographic area in which the facility is located. The projection factor is not related to the circumstances existing in an individual facility.

In certain instances a facility that experiences cost increases that are in excess of the inflation factor used in establishing the reimbursement rate may appeal for a rate revision. I am enclosing for your information a copy of our current rules regarding such appeals and you will note that there is no authority for the State to increase an established rate as the result of salary negotiations. Therefore, the salary increases which were negotiated by your facility can not be considered as appealable items.

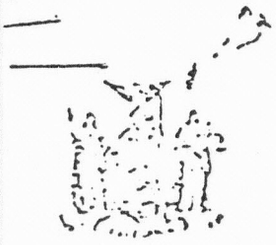
You are no doubt aware that Governor Carey has proposed a 1976 freeze on residential health care facility rates. If the Legislature adopts a freeze, there would of course be no new projection factor. Beyond calling this matter to your attention, we must await the deliberations of the Legislature at the 1976 session.

Sincerely yours,

William F. McCann

William F. McCann
Assistant Commissioner

EXHIBIT B
[Annexed to Affidavit of Leon J. Davis]



ROBERT P. WHALEN, M.D.
COMMISSIONER

STATE OF NEW YORK
DEPARTMENT OF HEALTH

TOWER BUILDING
EMPIRE STATE PLAZA
ALBANY, NEW YORK 12237

DIVISION OF HEALTH
FACILITIES, ECONOMICS, AND
PREVENTIVE HEALTH SERVICES

FRANK T. CICERO, M.D.
DEPUTY COMMISSIONER

M75-311

December 11, 1975

A. Lee Lichtman, M.D.
President
Metropolitan New York
Nursing Home Association
450 East 63rd Street
New York, New York 10021

Dear Doctor Lichtman:

Doctor Whalen has asked me to reply to your telegram concerning the Local 144 strike notice.

Our office for New York City Affairs is fully informed about this serious problem, and will act as our liaison should specific response be required of this Department. In addition, we have been in touch with Regional HEW staff and the Federal mediator. All necessary steps will be taken to protect patients, including location of replacement staff.

Your Association must be made aware that no 1976 Medicaid rate increases will be granted because of labor negotiations. This policy is set forth in amended section 86.17 of the Commissioner's Rules and Regulations, as transmitted on October 31, 1975 in Hospital Memorandum 75-160.

In addition, Governor Carey has proposed a freeze on nursing home rates. If the Legislature adopts this portion of the Governor's fiscal reforms, it is obvious that no rate increases will be granted.

Patients must and will be protected, but rate increases can not be counted on as a way of solving your labor problems.

Sincerely yours,

Frank T. Cicero, M.D.
Deputy Commissioner

AFFIDAVIT OF JUDY BEREK IN SUPPORT OF REQUEST FOR ORDER TO SHOW CAUSE

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO and DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO,

Plaintiffs,

v.

HUGH CAREY, GOVERNOR OF THE STATE OF NEW YORK; and ROBERT P. WHALEN, COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK,

Defendants.

CIVIL ACTION No._____

AFFIDAVIT

JUDY BEREK, being duly sworn, deposes and says:

I am Legislative Director for District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO ("District 1199").

I participated in the final steps of negotiations at Lakeshore Nursing Home when the collective bargaining agreement was finally executed between the parties on December 29, 1975. Since reimbursement to the Home from the New York State Department of Health was a precondition for the said collective bargaining agreement to become effective, I became involved in

the approval for reimbursement for the wage increase included in the said Agreement with the New York State Department of Health. Consequently, I caused the collective bargaining agreement dated December 29, 1975 to be delivered to the office of Mr. McCann at the Department of Health together with papers of calculations prepared by the Employer in connection with the cost accounting relative to the reimbursement necessary to meet the contractual wage increase. Although the contractual wage increase involved thirty cents (30¢) per hour, twenty cents (20¢) of the said increase was automatically effectuated as a result of the State Minimum Wage Law that went into effect January 1, 1976. There therefore remained an increase of ten cents (10¢) an hour to be approved for reimbursement.

I then inquired regarding any action that was taken with respect to the said reimbursement and I was informed by Mr. Donald Davidoff in Mr. McCann's office in the Department of Health in Albany that the matter would not be considered at all since there was in effect a Medicaid freeze. Upon later inquiry in the same Department of Health, it was suggested to me that the matter would be looked into, but, at the same time I was assured that nothing could be done in

connection with such reimbursement due to the Medicaid freeze.

Judy Berek

Judy Berek

Sworn to before me, this 4th

day of February, 1976.

Florence H. Johnson

Notary Public

FLORENCE H. JOHNSON
NOTARY PUBLIC, State of New York
No. 31-1978380
Qualified in New York County
Commission Expires March 30, 1977

AFFIDAVIT OF RICHARD DORN IN SUPPORT OF PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO, and DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO, Plaintiffs,	Civil Action No. 76 Civ. 645
v.	AFFIDAVIT
HUGH CAREY, GOVERNOR OF THE STATE OF NEW YORK, and ROBERT P. WHALEN, COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK, Defendants.	

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RICHARD DORN, being duly sworn, deposes and says:

1. I am a member of the firm of Sipser, Weinstock, Harper, Dorn & Leibowitz, attorneys for the plaintiffs in this case. I submit this affidavit in support of plaintiffs' application for a preliminary injunction.

2. I was the attorney of record in a number of recent cases in which hospitals sought injunctions against District 1199 National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO alleging that their employees, members of District 1199,

had engaged in work stoppages in violation of the collective bargaining agreements. The work stoppages were in protest of the laying off of members of District 1199 at each of the institutions. See St. Luke's Hospital Center v. District 1199, etc. et al., 76 Civ. 655 (S.D.N.Y. 1976); The Brookdale Hospital Medical Center v. District 1199 Nat'l. U. of Hospital and Health Care Employees, RWDSU, AFL-CIO, 76 Civ. 672 (S.D.N.Y. 1976); New Rochelle Hospital Medical Center v. District 1199, etc., et al., 76 Civ. 849 (S.D.N.Y. 1976); Beth Abraham Hospital, A Division of Montefiore Hospital and Medical Center v. District 1199, etc. et al., 76 Civ. 673 (S.D.N.Y. 1976).

3. In each of these cases the Administrator of the hospital or some other high official testified that the layoffs were instituted because of the Medicaid freeze, as a result of which the hospitals were unable to obtain any increases over their 1975 reimbursement rates. They thus were forced to layoff members of District 1199 as an economy measure.

4. In Brookdale the layoffs amount to over 300 employees. The number of employees laid off at New Rochelle exceeds 40, while over 20 employees have been laid off at Beth Abraham and St. Lukes.

5. These layoffs have already taken place and are a further indication of the irreparable harm already suffered

by plaintiffs and its members, and are additional proof that injunctive relief is absolutely essential.

Richard Dorn
Richard Dorn

Sworn to before me this
1st day of March, 1976
Virginia T. Montouth

VIRGINIA T. MONTOUTH
Notary Public, State of New York
No. 24-[illegible]
Qualified in Kings County
Cert. filed in Kings Co. Clk. & N.Y. Co.
Commission Expires March 30, 1976

OPINION OF METZNER, D.J.

METZNER, D. J.

Plaintiffs, the National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, and District 1199 of that union (hereinafter collectively "the unions"), move for a preliminary injunction to bar the enforcement of two recently promulgated regulations of the defendant Commissioner of Health of the State of New York. These regulations, it is claimed, effectively freeze the rate of Medicaid reimbursement at 1975 levels. 10 N.Y.C.R.R. §§ 86.21(k), 86.17 (eff. Nov. 26, 1975).

The action seeks declaratory and injunctive relief based on the claim that such a freeze of Medicaid rates is in violation of two federal statutes. The first is 42 U.S.C. § 1396a(13)(D) which requires reimbursement to hospitals and nursing homes for the full reasonable cost of health care services rendered pursuant to the statute. The second is the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. § 141, et seq., which is claimed to be violated because the freeze places an undue burden on free collective bargaining.

Section 86.21(k) of Title 10 provides:

> "(k) Effective for fiscal years ending in 1976 and thereafter allowable costs per unit of service (in-patient day, clinic visit, etc.) in a base year will not include any cost increases over the prior year which are in excess of the inflation factor used by the department in determining the reimbursement rate in effect during such base year unless the cost increases in the base year resulted in a rate revision during the rate year in accordance with section 86.17 of this Part."
> (10 N.Y.C.R.R. § 86.21(k).)

Section 18.17 does not include any provision for a raise in reimbursement due to a negotiated contract with a union for an increase in wages.

There is no question that labor is the major expense in the operation of a health care facility. The record shows that health care facilities have already stated to the unions that pay increases over present levels will be impossible as contracts come due, since such increases would not be covered by Medicaid reimbursement except for an inflation factor determined by the Department of Health. The department takes the position that rate increases cannot be relied on by provider health services to solve their labor problems. Hence, the union brings this action to declare the regulations void.

The defendants claim that this action is premature, since payments under existing contracts have not been affected, that plaintiffs lack standing to sue, and that the regulations do not conflict with either of the federal statutes relied on by plaintiffs.

As to the state's claim that the action is premature, the complaint states that a strike has already been prolonged, and a collective bargaining agreement rendered null and void because of the application of the regulations. The plaintiffs also claim that they have been informed by employers that the Medicaid freeze precludes consideration of any increase in wages when the present contract expires on June 30, 1976.

Obviously, it is advantageous to negotiate a new contract in advance of the expiration date of the existing contract. The wage question is already being discussed. The impact of the regulations is being felt now. It would be counter-productive to await a strike in July before deciding the issues presented by this application.

We come then to the question of standing. As the most recent expostulation of standing has put it,

the plaintiff must allege that he himself has suffered "'some threatened or actual injury resulting from a putatively illegal action . . . .'" Warth v. Seldin, 422 U.S. 490, 499 (1975) (citation omitted). This has been characterized as the minimum constitutional mandate of Article III.

The Court went on to state that "even when the plaintiff has alleged injuries sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Id. (citations omitted).

Finally, when it comes to the prudential rules of standing, the source of the claim to relief assumes critical importance, and in such cases the question is whether "the constitutional or statutory provision on which the claim rests properly . . . be understood as granting persons in the plaintiff's position a right to judicial relief." Id. at 500 (footnote omitted).

Standing requires that the plaintiffs have such a personal stake in the outcome of the controversy

that the questions will be framed with necessary specificity, contested with necessary adverseness, and pursued with necessary vigor. See Flast v. Cohen, 392 U.S. 83, 106 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962).

In the instant case, plaintiffs argue that injury in fact alone justifies their lawsuit. Injury is alleged to flow from the administrative action taken by the state since it fails to include pay increases in determining the reasonable cost of in-patient services rendered to Medicaid patients and reimbursed by state payments to health care institutions. Injury is also claimed because the state action is alleged to interfere with the statutorily protected right of collective bargaining.

Under federal law, all states which provide federally supported Medicaid payments must reimburse the full actual reasonable cost of those services so that no non-Medicaid patient is burdened with any portion of the expense of patients who are Medicaid covered. 42 U.S.C. §§ 1396(a)(13)(D), 1395x(v)(1)(A); 45 C.F.R. § 201.2; 20 C.F.R. §§ 205.30, 405.402. In this case the direct

injury, if any, is to two possible groups. The first group is composed of the health care institutions which are being limited to reimbursement for Medicaid patients at 1975 levels of payment, plus an inflation factor. If this limitation fails to satisfy the requirement for reimbursement for the reasonable cost of services rendered, it is the right and duty of the hospital to seek redress. They are in the best position to review and justify all the elements that are to be considered in arriving at a judgment as to what may be the reasonable cost of servicing a Medicaid patient. Conceivably, it could be determined that the negotiated labor cost is not reasonable because the employers did not bargain in good faith since they knew that whatever the result might be, they could automatically obtain reimbursement under the Medicaid formula. This possibility is not far-fetched in view of plaintiffs' allegations that the employers are using the freeze as a reason for not granting any increase in wages.

A second group directly injured would be those patients who would be charged disproportionately higher rates by reason of limitations in reimbursement for

Medicaid patients. Such patients would include private patients or those insured by Blue Cross or Medicare.

However, there is no statutory provision in the federal legislation providing for Medicaid programs which can be understood to afford plaintiffs a right to judicial relief. The legislative history of the statute reveals no intent to protect health care employees. In other words, the "logical nexus between the status asserted and the claim sought to be adjudicated" (Flast v. Cohen, 392 U.S. 83, 102 (1968)), is not present.

Plaintiffs have failed to show standing under any of the relevant indicia to seek relief for any claimed violations of 42 U.S.C. § 1396a.

The second ground alleged as justifying the relief sought is based on a claimed interference by the state with the unions' right to free and unhindered collective bargaining. The plaintiffs argue that by freezing the Medicaid reimbursement rate, health service providers are rendered unable to bargain freely with the unions, and that thus, the state regulations are in conflict with and preempted by the provisions of the LMRA. It is their position that they are entitled to an

increase in wages in excess of current levels, plus a percentage reflecting the inflation rate for the present year. Under this theory, plaintiffs clearly have a stake in the outcome, and are within the protective intendment of the LMRA. Accordingly, if, under a provision of the LMRA, there is a right that may be enforced in this area against the state, the unions would have standing to raise such a right.

However, the court has reached the conclusion that plaintiffs fail to state a claim under the LMRA.

Plaintiffs rely on several sections of the LMRA to show that the state action interferes with federal law. They cite Section 7, 29 U.S.C. § 157, which guarantees the right to free bargaining, and Section 8, 29 U.S.C. § 158, which makes a refusal to bargain in good faith an unfair labor practice. E.g., NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 485 (1960). The state's action does not prevent the employees from joining organizations of their own choosing or from bargaining collectively through representatives of their own choosing or from engaging in the other activities covered by Section 7.

Section 8 is directed against the employer. The state, however, is not the employer. Plaintiffs have cited no authority which holds that an independent business decision by one not a party to the collective bargaining agreement exposes that third party to suit under Section 8.

Furthermore, the freeze does not prevent the employers from bargaining in good faith. In the first place, the available sources of income are not limited to Medicaid reimbursement. Secondly, limitations on the sources of income do not connote refusal to bargain in good faith. Such limitations are important factors in arriving at the ultimate agreement.

It is undoubtedly true, as shown by the authority relied on by plaintiffs, that the state may not legislate in conflict with an area of federal preemption, and that hence, a state statute compelling arbitration was invalid as against federal law which makes collective bargaining and arbitration voluntary. North Shore University Hospital v. Levine, 90 L.R.R.M. 2529 (E.D.N.Y. 1975). This is a far cry from what is claimed in this case.

Similarly, the statement by the fact finder in Waterbury Hospital and District 1199, Case No. H.C. 175-732-B.O.1., to the effect that he could not be limited by a policy of the Connecticut Commission on Hospitals and Health Care that it would not approve hospital budgets which reflected an increase in labor costs in excess of 9 per cent, is not in point.

The motion for a preliminary injunction is denied and the complaint is dismissed.

So ordered.

Dated: New York, N. Y.
March 23, 1976

U. S. D. J.

JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO; and DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO

Plaintffs

-against-

HUGH CAREY, Governor of the State of New York and ROBERT P. WHALEN, Commissioner of Health of the State of New York

Defendants

76 Civil 645 (CMM)

JUDGMENT

- X

Plaintiffs having moved the Court for a preliminary injunction and the motion having come on to be heard before the Honorable Charles M. Metzner, United States District Judge, and the Court thereafter on March 23, 1976, having handed down its opinion denying motion for a preliminary injunction and dismissing the complaint, it is,

ORDERED, ADJUDGED and DECREED: That defendants HUGH CAREY, Governor of the State of New York and ROBERT P. WHALEN, Commissioner of Health of the State of New York, have judgment against plaintiffs NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO, and DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO, dismissing the complaint.

Dated: New York, N.Y.
March 26, 1976

Raymond F. Burghardt
Clerk

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO, and DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO,

Plaintiffs,

-against-

HUGH CAREY, Governor of the State of New York and ROBERT P. WHALEN, Commissioner of Health of the State of New York,

Defendants.

76 Civil 645 (CMM)

NOTICE OF APPEAL

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Notice is hereby given that National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, and District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, plaintiffs above-named, hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment dismissing the complaint entered in this action on the 26th day of March, 1976.

Dated: New York, New York
April 21, 1976

SIPSER, WEINSTOCK, HARPER, DORN
& LEIBOWITZ

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1 Copies Received

Date May 27, 1976

From Hon. Louis J. Lefkowitz

By _____

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MAY 27 1976

Louis J. Lefkowitz
ATTORNEY GENERAL